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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-437

MYRON M. AMATO and JACK L. ROCKEY,
Petitioners,

v.

STATE OF WISCONSIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Petitioners pray that a writ of certiorari issue to review the judgments of the Supreme Court of the State of Wisconsin entered on February 2, 1971. Rehearing was denied on May 28, 1971.

OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported at 49 Wis. 2d 638, 183 N.W. 2d 29 and is set out in the appendix, pp. 18 through 25. Petitioners were originally convicted upon trial by jury in the County Court of Rock County, Wisconsin, Branch No. 4, and no opinion exists with respect to that conviction.

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin was entered on February 2, 1971, and a timely filed petition for rehearing was denied on May 28, 1971. By order signed August 19, 1971, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari until September 27, 1971. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Supreme Court of Wisconsin is in conflict with decisions of this Court which have held similar publications not to be obscene as a matter of law?

2. Whether the decision of the Supreme Court of Wisconsin that the State need not submit expert tesimony as to contemporary community standards relating to the description or representation of sexual matters in an obscenity prosecution denied petitioner their rights under the First, Fifth and Fourteenth Amendments to the United States Constitution?

3. Whether the Supreme Court of Wisconsin erred when it asserted that the jury instructions in the court below were based upon *Roth v. United States,* 354 U.S. 476 (1957) and succeeding cases?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves the First, Fifth and Fourteenth Amendments to the United States Constitution.

2. This case involves Section 944.21 (1) (a), Wisconsin Statutes, the pertinent part of which provides: "whoever intentionally does any of the following may be fined not more than $5,000 or imprisoned not more than 5 years or both: (a) . . . sells . . . any lewd, obscene or indecent written matter. . . .

STATEMENT OF THE CASE

On October 17, 1969, the petitioners, Myron M. Amato and Jack L. Rockey, manager and operated the J & M Bookstore in the City of Janesville, Wisconsin. On that day detectives from the Janesville Police Department entered the bookstore and purchased three magazines entitled *Heads Up, Tulip Review* and *Honey Bun.* As a result of those purchases the petitioners were subsequently charged with violation of Section 944.21 (1) (a), Wisconsin Statutes, which prohibits the sale of obscene material. Petitioner Jack L. Rockey was charged with one count of a violation of Section 944.21 (1) (a), Wis. Stats., for the publication entitled *Honey Bun.* Petitioner Myron M. Amato was charged with two counts of violating Section 944.21 (1) (a), Wis. Stats., for the sale of the other two magazines.

Prior to trial the petitioners filed motions to dismiss the criminal prosecutions on the ground that the materials involved were not obscene as a matter of law under the decisions of this Court. The trial court, Rock County Court, Branch No. 4, denied these motions to dismiss. A jury trial commenced on January 20, 1970, wherein the State adduced testimony which indicated that the petitioners were clerks in an adult bookstore. The store displayed signs stating "Adults Only" and "You must be 21 to enter". It was impossible to see into the store or its

contents from the street. As part of the State's case a social worker for the Janesville public school system was called to testify. On direct examination the social worker was shown the publication *Honey Bun,* marked as State's Exhibit No. 1, and was then asked the following question:

> Q. Do you have an opinion, Mr. Kjell, as to whether or not that material, taken as a whole, is patently offensive because it affronts the contemporary community standards? (A. Ap. 137)[1]

Defense counsel objected to the question on the grounds that no foundation had been laid to qualify the witness as an expert on contemporary community standards. The trial court sustained the objection stating: "You are invading the province of the jury. The Court will sustain the objection." (A. Ap. 137) The prosecution never attempted to introduce any expert testimony as to contemporary community standards again in the trial. At the close of the State's case, the defense made the following motion:

> The second motion would be to dismiss for the reason that the State has failed to prove or to present any evidence whatsoever as to what the prevailing contemporary standards of the United States or even Rock County or the city of Beloit or Janesville is [sic] at the present time. (A. Ap. 139)

The motion was denied by the trial court in the following statement:

> On the question of the State failing to present evidence as to the prevailing community standard, I agree with the authorities cited by Mr. Ruth, that

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[1] Notations "A. Ap." followed by a page number refer to the page in the Appellant's Appendix in the court below which comprises the certified record herein.

> positive proof of a definite national standard is not necessary so long as there is proof offered from which a jury can infer that a statndard has been violated; and a jury can certainly draw upon their own experience one way or another in determining what the present dominant—or what the community standard is. (A. Ap. 142)

Thereafter, the defense presented four of its own witnesses on the issue of obscenity and rested. Defense counsel then submitted the following proposed instruction:

> You are instructed that whenever reference is made to contemporary community standards, it is the national standard of the United States and not a local standard such as the contemporary community standards of Beloit, Janesville, Rock County or even of Wisconsin. In determining the national standards, you should consider the evidence, which has been presented in this case as to what these national standards are. You are not to use your own judgment as to what the national community standards are but should make that determination from the evidence in this case. (A. Ap. 107)

The trial court refused this instruction and instead instructed the jury as follows in pertinent part:

> When prior reference was made to the community, it was not intended to limit its environment to the local area that surrounds us. It cannot be so restricted. The word "community," as used here in these instructions, actually means the whole community of the nation, and, therefore, the standards which you are to apply are those that have been applied in determining the scope of expression and interpretation under the Federal Constitution on that geographical basis.
>
> You will consider the material from the standpoint of its literary, cultural and educational character, and determine whether it has any redeeming social or literary value or importance. You are to consider

> the purposes, the ideas, the pictures, and the artistic qualities of the material, if any. Material that describes or represents sex in various forms is not obscene if its social or literary values or importance outweigh the prurient or the offensive aspects of it. If the quality of the material has a significant and overbearing social or literary value, it may not be found to be obscene merely because it offends community standards, or appeals to prurient interests.
>
> It is for you to balance all the factors and elements involved, and determine whether the material is or is not obscene, as obscenity has been defined in these instructions, giving such weight and effect to each factor and element as you deem it entitled to receive. (A. Ap. 114-115)

The jury returned a verdict of guilty as to both petitioners. Petitioner Rockey received a fine of $3,000 or in default thereof a six-month sentence in the County Jail. Petitioner Amato received a fine of $3,000 or in default thereof a sentence of six months in the County Jail as to Count I. As to Count II petitioner Amato was fined $2,000 or in default thereof sentenced to 120 days in the County Jail consecutive to the penalty imposed in Count I.

On February 2, 1971, the Supreme Court of Wisconsin affirmed petitioners' convictions and sentences. A petition for rehearing was denied on May 28, 1971.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE WISCONSIN SUPREME COURT IS IN CONFLICT WITH DECISIONS OF THIS COURT AS TO THAT TYPE OF PICTORIAL MATERIAL WHICH IS CONSTITUTIONALLY PROTECTED AND NOT OBSCENE AS A MATTER OF LAW.

In making an independent review of the magazines which are the subject of this petition, the Wisconsin Supreme Court entered a brief description of the materials:

> We think the magazines here involved are more than a collection of photographs of nude men and women which suggest sexual activity. In the instant case much of the material concerns itself with the depiction of sexual activity. [49 Wis. 2d 638, 642, 183 N.W.2d 29, 31 (1971)] [Petitioners' Appendix, p. 21]

Petitioners respectfully submit that such a finding is a careless oversimplification and clear error. Each of the three publications differs in content. Each must be considered individually. To group all three publications into the same classification or description hardly comports with the warning of this Court that:

> The question whether a particular work is of [an obscene] character involves not really an issue of fact, but a question of constitutional *judgment* of the most sensitive and delicate kind. *Roth v. United States,* 354 U.S. 476, 497-498 (1957) (J. Harlan concurring).

The Wisconsin Supreme Court failed to note that the publication in the *Rockey* prosecution merely involved photographs of nude women. Generally, the subjects are posed in the nude with their legs and knees spread wide to fully expose the genital areas. Of the 35 photographs

comprising the 36-page publication there is no suggestion or depiction of sexual activity. Likewise, the publications, *Heads Up,* Vol. 1, No. 1, and *Tulip Review,* avoid any depiction of sexual activities such as intercourse, fellatio or cunnilingus. However, *Heads Up* and *Tulip Review* do differ from the publication involving petitioner Rockey, in that members of both sex appear in the same scenes. *Tulip Review* and *Heads Up,* Vol. 1, No. 1, generally contains photographs of both males and females in various poses with the sex organs prominently displayed.

Recent decisions by this Court indicate that at minimum the publication *Honey Bum,* which was involved in the *Rockey* prosecution is not obscene as a matter of law. Where the material only involves photographs of individually posed female models with the genital area exposed, the material is not proscribable. This Court in *Bloss v. Dykema,* 398 U.S. 278 (1970), held under authority of *Redrup v. New York,* 386 U.S. 767 (1967), in a per curiam opinion, that the magazines described by the Michigan Court of Appeals below were not obscene. Each of the magazines presented to this Court in *Bloss v. Dykema, supra,* is for practical purposes identical to the publication *Honey Bun.* The Michigan Court of Appeals described the publications involved in *Bloss v. Dykema,* 17 Mich. App. 318, 169 N.W.2d 367 (1969), as follows at 373:

> Generally speaking, most of the magazines, especially the editions of "Cover Girl" and "Exciting," are dominated by photographs of nude or near-nude women in various sexual poses. These photographs often depict: the model on a bed or the bed as part of the picture; the model is in an enticing or lewd position such as a position of sexual intercourse;

> the pubic area is bare and such clothing as the women wear tends to accentuate the focus on the pubic area, *i.e.* silk stockings and garter belt; the model's pose accentuates the pubic area, *i.e.* the vagina is open; the model removes her clothing in a series of pictures suggestively; properties such as beds, stools, veils, chairs and clothing are used in such a way as to heighten purient interest.

Earlier this Court reached a similar result in *Central Magazines Sales, Ltd. v. United States,* 389 U.S. 50 (1967). In a per curiam opinion the decision of the United States Court of Appeals for the Fourth Circuit was reversed. The Court of Appeals in *Central Magazines Sales, Ltd. v. United States,* 373 F. 2d 633, 634 (4th Cir. 1967), described one of the publications as follows:

> *Exclusive* is a collection of photographs of young women. In most of them, long stockings and garter belts are employed to frame the pubic area and to focus attention upon it. A suggestion of masochism is sought by the use in many of the pictures of chains binding the model's wrists and ankles. Some of the seated models, squarely facing the camera, have their knees and legs widespread in order to reveal the genital area in its entirety. In one of the pictures, all of these things are combined: the model, clad only in a framing black garter belt and black stockings is chained to a chair upon which she is seated, facing the camera, with one knee elevated and both spread wide.

More recently this Court denied certiorari in *Keriakos v. Hunt,* 400 U.S. 929 (1970). The lower court opinion of the United States Court of Appeals for the First Circuit in *Hunt v. Keriakos,* 428 F. 2d 606, 608 (1st Cir. 1970), commented:

> Rather, we are obliged to conclude that no photograph of the female anatomy, no matter how posed

if no sexual activity is being engaged in, or however lacking in social value, can be held obscene.[2]

And in *California v. Pinkus,* 400 U.S. 922 (1970), this Court granted certiorari and affirmed the lower court judgment by an equally divided Court. That case involved material described as follows by the United States Court of Appeals for the Ninth Circuit in *Pinkus v. Pitchess,* 429 F.2d 416, 417 (9th Cir. 1970): "The 'worst' of the material is described as a motion picture of a woman who, disrobed, feigns some type of sexual satisfaction which is self-induced."[3]

While petitioners strongly urge that material such as *Honey Bun* definitely is not obscene, there is additional authority to indicate that the other two magazines are protected publications as well, even though they may involve photographs of nude males and females together in sexually suggestive poses. No sexual act is depicted. This is not hard-core pornography. *Cf. United States v. 35 MM. Motion Picture Film Entitled "Language of Love",* 432 F. 2d 705 (2d Cir. 1970), *cert. granted, sub. nom. United States v. Unicorn Enterprises, Inc.,* 401 U.S. 907 (1971) and dismissed 403 U.S. 925 (1971); *United States v. A Film Entitled "Techniques of Physical Love",* 314 F. Supp. 1334 (E.D. La. 1970); *Keuper v. Wilson,*

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[2]Several lower federal court decisions and state supreme court decisions have reached the same conclusion. *Spinar v. United States,* No. 20, 250 (8th Cir. April 1, 1971); *City of Chicago v. Geraci,* 46 Ill. 2d 576, 264 N.E. 2d 153 (1970); *Commonwealth v. Donahue,* 263 N.E. 2d 589 (Sup. Jud. Ct. Mass., 1970).

[3]The material was also described by the lower state court in *People v. Pinkus,* 256 Cal. App. 2d Supp. 941, 63 Cal. Rptr. 680, 684 (1967) as follows: "Each shamelessly depicts a young woman stripping absolutely naked; brazenly and shamelessly displaying breasts, genitalia, pubic hairs, and the anal area; and engaging in masturbation or motions and gyrations simulating a female in sex play and sexual intercourse."

111 N.J. Super. 489, 268 A.2d 753 (1970); *Commonwealth v. Donahue,* 263 N.E.2d 589 (Sup. Jud. Ct. Mass., 1970); *Scunio v. Columbus Theatre, Inc.,* 277 A.2d 924 (R.I., 1971).

II. THE DECISION OF THE SUPREME COURT OF WISCONSIN THAT THE STATE NEED NOT SUBMIT EXPERT TESTIMONY AS TO CONTEMPORARY COMMUNITY STANDARDS PERMITTED THE JURY TO ASSUME FACTS NOT IN EVIDENCE, DENIED PETITIONERS THEIR RIGHTS OF CROSS-EXAMINATION, DENIED PETITIONERS DUE PROCESS OF LAW, AND INFRINGED UPON THEIR RIGHTS OF FREE SPEECH AND EXPRESSION.

The lower court ruled that affirmative proof of contemporary community standards under the *Roth-Memoirs* [*A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General,* 383 U.S. 413 (1966)] test was not required since the "mere existence of the magazines was sufficient without expert testimony to present a jury question." [49 Wis. 2d 638, 645, 183 N.W. 2d 29, 32 (1971)] [Petitioners' Appendix, p. 24]

The necessity for expert testimony was explained clearly in the concurring opinion of Justic Frankfurter in *Smith v. California,* 361 U.S. 147, 165, 166 (1959):

> Community standards . . . can . . . hardly be established except through experts. . . .
>
> There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the tastes or moral outlook of individual jurors or individual judges. . . .

> Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of "contemporary community standards."

The same view was expressed by the California Supreme Court in *In re Giannini,* 69 Cal.2d 563, 72 Cal. Rptr. 655, 663, 446 P. 2d 535, 543 (1968), *cert. den.*. 395 U.S. 910 (1969).

> Relying principally on the well-established doctrine that jurors should not be endowed with the prerogative of imposing their own personal standards as the test of criminality of conduct, we hold that expert testimony should be introduced to establish community standards. We cannot assume that jurors in themselves necessarily express or reflect community standards; we must achieve so far as possible the application of an objective, rather than a subjective, determination of community standards.

The Supreme Court of Pennsylvania in *Duggan v. Guild Theatre, Inc.,* 436 Pa. 191, 258 A.2d 858, 863 (1969), stated:

> Courts of law are not capable of deciding what contemporary standards are, without the benefit of any evidence whatsoever.

More recently, the Supreme Court of Rhode Island stated in *In Re Seven Magazines,* 268 A.2d 707, 712 (1970):

> Instead we reverse on the ground that the state has failed on any conceivable basis to prove its case. Here, as will be recalled, the only evidentiary predicate for the conclusion that the publications are ob-

> scene under any of the views expressed in *Redrup*, are the publications themselves. Apparently, the prosecution believes that a theory akin to *res ipsa loquitur* applies to obscenity cases, and that no evidence other than the presentation of the magazines is required in order to establish a violation of the statutory and constitutional standards. While we have no doubt that "* * * hard-core pornography * * * can and does speak for itself", [citation omitted], certainly materials falling short — as do these publications — cannot be classified as obscene merely upon the presentation of the publications without more."[4]

Despite this lengthy array of authority, the Wisconsin Supreme Court gave the question little attention. No authority was cited for its position. No mention was given to the fact that jurors drawn from a particular locality, Rock County, Wisconsin, were to pass upon contemporary standards relating to the description and representation of sex for the entire nation.[5]

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[4]Accord: *United States v. One Carton Positive Motion Picture Film Entitled, "491"*, 367 F. 2d 889 (2d Cir. 1966); *Poulos v. Rucker*, 288 F. Supp. 305 (D.C. Ala. 1968); *United States v. 392 Copies of a Magazine Entitled, "Exclusive"*, 353 F. Supp. 485 (D.C. Md. 1966), rev. other grnds. *Central Magazines Sales, Ltd. v. United States*, 389 U.S. 50 (1967); *Commonwealth v. Dell Publications, Inc.*, 233 A. 2d 840 (Pa. 1967); *House v. Commonwealth*, 210 Va. 121, 169 S.E. 2d 572 (1969); *Dunn v. Maryland State Board of Censors*, 240 Md. 249, 213 A. 2d 751 (1965); *Leighton v. State Board of Censors*, 242 Md. 705, 218 A. 2d 179 (1966); *Levin v. State*, 1 Md. App. 139, 228 A. 2d 487 (1967); *Donnenberg v. State*, 1 Md. App. 591, 232 A. 2d 264 (1967); *Hudson v. United States*, 234 A. 2d 903 (D.C. 1967); *Morris v. United States*, 259 A. 2d 337 (D.C. 1969); *Ramirez v. State*, 430 P. 2d 826 (Okla. 1967); *Keuper v. Wilson*, 111 N.J. Super. 489, 268 A. 2d 753 (1970).

[5]See, Comment, *Expert Testimony in Obscenity Cases*, 18 HASTINGS L. J. 161, 177 (1966):

> Where the community used as the standard is a national one, as it will be in most cases, the prosecution or plaintiff should be re-

Petitioners submit that the absence of any evidence on contemporary national standards gave the jury free rein to consider matters not in evidence at the trial. Clearly, the jury could not have rendered verdicts of guilty unless they agreed upon some sort of standard based upon facts or opinion not in the record at trial. Ironically, the jury was permitted to engage in this speculative exercise even though they had been instructed by the trial court that it was their "duty to exclude from consideration everything except evidence received on this trial." (A. Ap. 109)

Petitioners submit that this procedure necessarily blocked the exercise of their rights of cross-examination and denied them due process of law. In essence, the jury was permitted to take judicial notice of a fact clearly in dispute, and the adversaries were deprived of any opportunity to challenge the assumptions of facts or opinion.

In *Garner v. Louisiana,* 368 U.S. 157, 173 (1961), this Court stated:

> Furthermore, unless an accused is informed at the trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or the truth of the facts allegedly relied upon.

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quired to submit evidence in addition to the material itself (*e.g.* expert testimony, similar material adjudicated to be obscene elsewhere) regarding contemporary community standards, in order to sustain its burden of proof.

See also, Note, *The Use of Expert Testimony in Obscenity Litigation,* 1965 Wis. L. Rev. 113, 120:

> Even if it is conceded that community standards, as envisioned in the *Roth* test, do exist meaningfully on a national scale (a matter by no means clear), it is inconceivable that a jury drawn from a local community could ever be knowledgeable enough to accurately relate such standards to a particular case.

> Moreover, there is no way by which an appellate court may review the facts and law of a case and intelligently decide whether the findings of the lower court are supported by the evidence where that evidence is unknown. Such an assumption would be a denial of due process.

See also, *City of Phoenix v. Fine*, 4 Ariz. App. 303, 420 P. 2d 26 (1966).

The Wisconsin Supreme Court itself has held that the failure to adduce expert testimony on issues requiring such proof necessarily results in insufficient proof. *Cramer v. Theda Clark Memorial Hospital*, 45 Wis. 2d 147, 152, 172 N.W. 2d 427 (1970). Thus, petitioners submit that the failure to adduce any evidence of contemporary community standards was a denial of due process of law. *Thompson v City of Louisville*, 362 U.S. 199 (1960).

Petitioners also submit that the failure to submit any affirmative proof as to contemporary national standards led to an infringement of their First Amendment rights of free speech and expression. This Court has repeatedly declared that in the First Amendment area sensitive tools must be utilized to separate protected speech from that which is proscribable. In *Lee Art Theater, Inc. v. Virginia*, 392 U.S. 636, 637 (1968), this Court referred to those "constitutional requirements demanding necessary sensitivity to freedom of expression." And in *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961), this Court stated that there must be a procedure which is "designed to focus searchingly on the question of obscenity." For these reasons, petitioners submit that their First Amendment rights of free speech and expression are necessarily infringed where the issue of obscenity is joined without any affirmative proof as to contemporary community standards.

III. THE DECISION OF THE WISCONSIN SUPREME COURT MISTAKENLY ASSERTED THAT THE JURY INSTRUCTIONS WERE BASED UPON *ROTH* AND SUCCEEDING CASES.

The instructions given the jury permitted them to weigh the social value of the materials against the other criteria for obscenity. [See p. 6, *infra.*] This Court expressly decided that such a balancing or weighing was impermissible in *A Book Named "John Cleland's Memoirs Of a Woman Of Pleasure" v. Attorney General,* 383 U.S. 413 (1966).

> The Supreme Judicial Court [of Massachusetts] erred in holding that a book need not be "unqualifiably worthless before it can be deemed obscene." A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the reckless and prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness.[6]

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[6] Accord: *Jacobellis v. Ohio,* 378 U.S. 184, 191 (1964); *United States v. One Carton Positive Motion Picture Film Entitled, "Techniques of Physical Love",* 314 F. Supp. 1334 (E.D. La. 1970); *Trans-Lux Distributing Corp. v. Maryland Board of Censors,* 240 Md. 98, 213 A. 2d 235 (1965); *People v. Bruce,* 31 Ill. 2d 459, 202 N.E. 2d 497 (1964).

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF WISCONSIN SUPREME COURT

APPEAL from judgments and orders of the county court of Rock county: MARK J. FARNUM, Judge. *Affirmed.*

The defendant Myron Amato was arrested and charged with two counts of violation of sec. 944.21(1)(a), Stats., which prohibits the sale of obscene material. The defendant Jack L. Rockey was charged with one count of violation of sec. 944.21(1)(a), Stats. After a jury trial, the defendants were found guilty. The defendant Amato was sentenced to a fine of $3,000 and in default of payment six months in the county jail under the Huber law on Count I and a fine of $2,000 and in default of payment 120 days in the county jail under the Huber law, consecutive with the penalty imposed in Count I. The defendant Rockey was sentenced to a fine of $3,000 and in default of payment six months in the county jail under the Huber law.

A motion for a new trial was denied. The defendants appeal.

On October 17, 1969, the defendants operated the J and M Bookstore in the city of Janesville, Wisconsin. The store was open to the public. It was impossible to see into the store from the street. The store displayed signs stating "Adults Only" and "YOU MUST BE 21 TO ENTER."

The state introduced three exhibits which form the basis of these prosecutions. They are the magazines *Heads Up, Honey Bun* and *Tulip Review.*

Further facts will be stated in the opinion.

HANLEY, J. The following issues are presented on appeal:

(1) Are the magazines involved in this appeal constitutionally not obscene as a matter of law;

(2) Has *Redrup v. New York*[1] overruled or limited preexisting holdings on the government's authority to regulate obscene material;

(3) Was it necessary for the state to prove by affirmative proof that the materials involved in this appeal were patently offensive because they affronted community standards relating to the description or representation of sexual matters; and

(4) Was it prejudicial error to permit an assistant district attorney to testify regarding pending prosecutions.

Obscenity As a Matter of Law.

The question of obscenity is not exclusively one of fact. It has been termed a mixed question of fact and constitutional law. This court has recognized that a judgment of obscenity is not an ordinary issue of fact, but rather one also involving issues of legal and constitutional interpretation. *McCauley v. Tropic of Cancer* (1963), 20 Wis. 2d 134, 148, 121 N.W. 2d 545.

In the *McCauley Case* there was no verdict to review; and this court based its reversal on an independent reading of the book involved. The defendants contend that the magazines they were convicted for selling are similar to those involved in other cases where lower court obscenity convictions were reversed *per curiam* by the United States Supreme Court, and that, as a result, they are not obscene as a matter of law. In these cases, the

[1](1967), 386 U.S. 767, 87 Sup. Ct. 1414, 18 L. Ed. 2d 515.

reversals contain no discussion whatsoever, but only a bare reference to *Redrup, supra.*

In support of their contention that the three magazines here involved are, as a matter of law, not obscene, defendants describe the materials involved in several *per curiam "Redrup* reversals." While a few of these cases —notably, *Central Magazine Sales, Ltd., v. U. S.* (1967), 389 U.S. 50, 88 Sup. Ct. 235, 19 L. Ed. 2d 49, — may have involved magazines bearing similarity to one of the magazines here involved, the other cases dealt with books, films and other items bearing no resemblance to the instant materials.

Central Magazines Sales, Ltd., v. U. S., supra, dealt with an appeal from *U. S. v. 392 Copies of Magazines Entitled "Exclusive"* (D.C. Maryland, 1966), 253 Fed. Supp. 485, which was affirmed by the Fourth Circuit in 1967 (373 Fed. 2d 633). In that case, the circuit court of appeals, at page 634, described the magazine as follows:

"*Exclusive* is a collection of photographs of young women. In most of them, long stockings and garter belts are employed to frame the pubic area and to focus attention upon it. A suggestion of masochism is sought by the use in many of the pictures of chains binding the model's wrists and ankles. Some of the seated models, squarely facing the camera, have their knees and legs widespread in order to reveal the genital area in its entirety. In one of the pictures, all of these things are combined: The model, clad only in a framing black garter belt and black stockings is chained to a chair upon which she is seated, facing the camera, with one knee elevated and both spread wide.

"We agree with the District Court that these apparently unretouched pictures of young women, posed as they are, are patently offensive and that the magazine *Exclusive* is obscene."

We think the magazines here involved are more than a collection of photographs of nude men and women which suggest sexual activity. In the instant case much of the material concerns itself with the depiction of sexual activity.

The jury in this case, after receiving instructions based on *Roth*[2] and succeeding cases, returned verdicts of guilty to charges of selling obscene materials.

An independant review of the magazines here involved reveals their similarities to, and differences from, the materials involved in the cases cited by appellants.

We conclude that the decisions cited by appellants form an insufficient basis for a ruling that these materials are not obscene as a matter of law.

Question of Modification of Obscenity Test.

The appellants contend that the decision in *Redrup v. New York, supra,* modified the constitutional definition of obscenity set forth in the *Roth v. U.S., supra,* and succeeding cases.

Prior to *Redrup* the accepted obscenity standard was known as the *Roth-Memoirs* test, under which materials could not be proscribed unless there was a showing that:

". . . (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *A Book Names "John Cleland's Memoirs of a Woman of Pleasure" v. Mass.* (1966), 383 U.S. 413, 418, 86 Sup. Ct. 975, 16 L. Ed. 2d 1.

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[2] *Roth v. U.S.* (1957), 354 U.S. 476, 77 Sup. Ct. 1304, 1 L. Ed. 2d 1498.

The only "pre-*Redrup*" modification of this rule was made in *Ginzburg v. U.S.* (1966), 383 U.S. 463, 86 Sup. Ct. 942, 86 Sup. Ct. 969, 16 L. Ed. 2d 31, which added a theory that "in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test."

In 1967, the case of *Redrup v. N. Y., supra,* was decided. *Redrup* was actually a consolidation of three separate cases. The court had originally limited the scope of review in all three cases to the questions of scienter, vagueness of state statutes and prior restraint. Instead, the court did not reach the constitutional issues but merely recounted the differing views of the members of the court and stated, at page 771:

"Whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand. . . ."

The court first noted that none of the cases involved violation of a statute aimed at protecting minors; none involved publication in a manner so obtrusive as to cause unwilling individuals to be exposed to the materials; and none involved any "pandering" of the materials which the court found so significant in *Ginzburg v. U. S., supra.*

The appellants contend that the decision in *Redrup* modifies the use and scope of the *Roth-Memoirs* test. They argue that magazines such as those involved in this case may not serve as the basis for obscenity prosecutions unless it can be shown that: (1) they were sold to minors; or (2) they were so obtrusively displayed as to cause unwilling viewers to see them; or (3) they were pandered in the manner described in *Ginzburg.*

We do not agree. *Redrup* is authority only for the proposition that the particular books and magazines there

involved were not obscene. We think that if the *Redrup* decision was intended to reverse the *Roth-Memoirs* test, that obscenity is not constitutionally-protected speech, the court would have so stated in no uncertain terms.

Appellants' argument has been specifically rejected in *Milky Way Productions, Inc., v. Leary* (S.D. N.Y., 1969), 305 Fed. Supp. 288, and affirmed by the United States Supreme Court.[3] In *Milky Way* the defendants contended that New York's obscenity statute was invalid because it contained only the *Roth* elements and did not include the other "test" claimed to be "added" to *Roth-Memoirs* by the *Redrup* decision. In rejecting this argument the trial court stated, at page 294:

"Plaintiffs misread the *per curiam* opinion in *Redrup*. As shown by the fuller opinions from which they derive, the supposedly additional, and allegedly essential, 'tests' are only *permissible* kinds of relevant *evidence* which may serve in a close case to tip the balance toward a finding of obscenity. . . .

". . .

"Nothing in *Redrup* changes the scope or effect of these added 'tests.' There is no support in that or any other decision of the Supreme Court for the view that they must be satisfied *in addition* to the three tests of *Memoirs* before a finding of obscenity is permissible. The standard as laid down in *Memoirs* was cited with approval as recently as Stanley v. Georgia, 394 U.S. 557, 568, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969). For a view of the precedents similar to ours, see United States v. 77 Cartons of Magazines, 300 F. Supp. 851, 853-854 (N.D. Cal. 1969)."

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[3] *New York Feed Company, Inc. v. Howard R. Leary* (1970), 397 U.S. 98, 90 Sup. Ct. 817, 25 L. Ed. 2d 78.

We conclude that *Redrup* is strictly limited to the question of obscenity of the specific materials there under consideration.

Proof Required That Material Violates Community Standards.

The appellants contend that in the absence of affirmative proof of "contemporary community standards" through expert testimony, the state cannot prevail. Several cases are cited in support of this contention. However, the appellants concede that some courts have held that affirmative proof on the issue of community standards is not necessary in obscenity cases. However, they contend the decisions are in the minority, most are pre-*Redrup* and in many of them there is a finding that the material involved is hardcore pornography, i.e., material which depicts sexual activity.

We believe that the mere existence of the magazines here involved was sufficient without expert testimony to present a jury question.

We conclude that expert testimony is not required.

Admission of Testimony Concerning Prosecutions in Milwaukee County.

Appellants contend that it was error to permit Mr. George Lawrence, an assistant district attorney for Milwaukee county, to testify regarding pending prosecutions in Milwaukee county.

The defendants had entered evidence that magazines exactly like the three magazines involved in this appeal were purchased during the trial in several bookstores in Milwaukee, Wisconsin. The state then, on rebuttal,

called Witness Lawrence who testified that he checked the court records and made notes of some of the cases being prosecuted in Milwaukee county. The purpose of such testimony was to rebut any inference that such shops are accepted in the community. The trial court admitted the testimony for such limited purpose on the basis that the witness represented the office in charge of all such prosecutions, had made a personal search and inspection of the relevant records and documents, and thus had sufficient personal knowledge.

We think the best evidence rule is inapplicable here because the witness did not testify as to the exact contents of the documents; hence, the original documents were only collaterally involved. McCormick, *Evidence* (Hornbook Series), page 412, sec. 200, states that the following factors are determinative of whether a document is only collaterally involved:

". . . Consequently, it is clear that where the effect of a writing is summarily or generally stated by the witness, without purporting to give its contents in detail, and the terms of the writing are unlikely to be disputed, or are not the subject of any important issue in the case, then such writing is regarded as a 'collateral' one, and the witness' statement of its effect without producing the writing itself, is permissible."

In any event, we fail to see in what manner the defendants' case was prejudiced under the trial court's rule.

By the Court. — Judgments and orders affirmed.